82-930

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

PEOPLE OF THE STATE OF NEW YORK, PETITIONER

v.

WAYNE T. NELSON

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF FACTS

On the night of March 21, 1979, respondent was walking in a northerly direction along the west side of Morningside Drive in a low crime, residential area of the Town of Guilderland. There were no sidewalks or streetlights along this section of Morningside Drive. It was a cold night, and respondent was walking in a hunched manner, chin down into his chest and shoulders up in an effort to protect his face and ears from the cold. Respondent was hatless and wearing a light corduroy jacket with both breast pockets buttoned or snapped.

At approximately 8 p.m. on this night, respondent was observed by the State Police in the persons of uniformed officers Trooper Michael Guiry and Trooper Recruit Charles Bare. The troopers had not received any reports of criminal activity in the area of Morningside Drive prior to observing respondent, nor had they observed respondent committing a particular crime. Respondent was walking unhurriedly and did not exhibit any furtive behavior at this time. Trooper Guiry testified that the hunched posture in which respondent was walking was suspicious, and from his position, some thirty feet behind respondent on a dark road, observed two bulges under the armpits of respondent's jacket.

Based on these observations, the troopers decided to stop respondent. Crossing into the oncoming traffic lane, the unmarked patrol car pulled within inches of his leg, thus preventing respondent's forward progress. Trooper Guiry asked re-

spondent to stop, and then asked respondent his name. Respondent stopped, turned and faced the car. He then stepped back and answered, "My name is Wayne Nelson." Respondent testified at the suppression hearing that Trooper Guiry had already known his name from previous encounters.

At the time of the seizure respondent did not attempt to dispose or secrete any articles in his possession, but he did look once to the right and once to the left, whereupon Trooper Guiry quickly exited the patrol car and was immediately followed by Trooper Bare. Trooper Guiry, with flashlight in hand, positioned himself on the left side of respondent; the other officer positioned himself on respondent's right side effectively seizing and surrounding him. Respondent was ordered to show the officers some identification. While respondent reached for his wallet, Officer Guiry noticed a bulge in the left-hand breast pocket of respondent's jacket and demanded that the pocket be emptied on the hood of the patrol car. Respondent refused to empty his pocket, whereupon his arms were grabbed by both officers. A short struggle ensued, and respondent was restrained face down on the hood of the patrol car. Thereupon, respondent was told he was under arrest; Trooper Guiry then unbuttoned the left breast pocket and removed a plastic bag containing a quantity of marijuana. At no time was any part of this bag exposed to plain view. Later at the State Police satellite station in the town of Guilderland, respondent was searched and a quantity of lysergic acid diethylamide was discovered in his possession.

POINT I

THE DECISION OF THE NEW YORK STATE COURT OF APPEALS, PEOPLE V. NELSON, DOES NOT VIOLATE THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

A. The Decision of the New York State Court of Appeals, People v. Nelson, was based upon Article I, Section 12 of the New York State Constitution.

Although the operative language of Article I, Section 12 of the New York State Constitution is identical to the language of the Fourth Amendment to the United States Constitution, there is of course nothing unprecedented or unique in a sovereign state's assertion of its privilege to more stringently safeguard individual rights. The United States Supreme Court has repeatedly maintained that the Federal Constitution establishes only a base level of protection for indivudal rights and that "a State is free as a matter of its own law to impose greater restrictions on police activity." (Oregon v. Hass, 420 U.S. 714, 719.) Thus, so long as freedom of the individual is thereby enlarged rather than diminished, recourse to State Constitutions for the vindication of individual rights is permitted and indeed mandated by our federalist system.

New York has not hesitated to avail itself of this fundamental principle of federalism. (See, People v. Elwell, 50 N.Y.2d 231, 235; People v. Hobson, 39 N.Y.2d 479; Sharrock v. Dell Buick-Cadillac, 45 N.Y.2d 152, 159-161; People v. Isaacson, 44 N.Y.2d 511.) The accelerating pace at which states have come to rely on their own Constitutions is the result of the some-

what corresponding increase in the number of instances "in which important conceptual shifts or troublesome indecision by the Supreme Court has disturbed the symmetry of State law whose design had been influencedby the Federal Constitution alone." (People v. Belton, 55 N.Y.2d 49, 61; dissenting op. per Fuchsberg, J.)

Contrary to the Appellant's assertion that Article I, Section 12 of the New York State Constitution has never been interpreted as providing greater protection than the Fourth Amendment of the United States Constitution, the New York Court of Appeals recently concluded that to the extent Spinelli v. United States (393 U.S. 40) and Draper v. United States (358 U.S. 307) may be read as imposing a less stringent test under the Fourth Amendment to the United States Constitution, Section 12 of Article I of the New York State Constitution is not construed similarly. (People v. Elwell, 50 N.Y.2d 231, 241.)

More importantly, in People v. DeBour (40 N.Y.2d 210) which presented an issue similar to the one at bar, the New York Court of Appeals drastically departed from the United States Supreme Court's traditional search and seizure analysis. DeBour treated the police-initiated encounter as a continuum, subject to constitutional scrutiny from the moment of approach to the arrest or clear seizure, and it postulated two distinct levels of interference below the level of a seizure. Thus, if it is based upon the United States Constitution, the DeBour opinion rests on extremely tenuous foundation for the Court of Appeals' apparent theory that constitutional recognition will be given to a continuum from point of contact through to ultimate arrest has been

severely eroded by Dunaway v. New York (442 U.S. 200) and Michigan v. Summers (101 S.Ct. 2587).

The immediate significance of Dunaway to DeBour reasoning is that the Supreme Court does not view the process of seizure as a continuum and that the Supreme Court does not think that sliding scale standards are helpful in guiding the police (United States v. Mendehall, 446 U.S. 544; Reid v. Georgia, 448 U.S. 438). Accordingly, the New York Court of Appeals' strict adherence to the sliding scale rationale to analyze investigatory detentions on less than probable cause can only be justified by reliance on Article I, Section 12 of the New York State Constitution.

B. The Fourth Amendment of the United States Constitution requires an individualized suspicion on the basis of articulable facts before an officer can detain an individual on less than probable cause.

In Terry v. Ohio (392 U.S. 1), the Supreme Court recast a fifty-year-old constitutional process of determining the sufficient level of probability to justify police action. Terry freed Fourth Amendment analysis from the rigidity of the probable cause standard, but in doing so, it introduced a certain amorphousness. To give it shape, the Court imposed several limitations on police discretion making it clear that, although less than probable cause sufficed to justify certain "lesser" intrusions, police action must be based on at least "specific articulable facts which, taken together with rational inferences

from those facts, reasonably warrant that intrusion." Id. at 21. An officer's "inchoate and unparticularized suspicion or 'hunch'" would not suffice. Id. at 27. Thus was born "reasonable suspicion," a new probability standard requiring less than probable cause, but more than a hunch; applying where the governmental intrusion was less than a full search; and being used because a specific governmental interest necessitated the intrusion.

The narrow scope of Terry was carefully maintained by its progeny. In Adams v. Williams (407 U.S. 143), the Supreme Court applied the Terry analysis to a frisk for weapons on the basis of a reasonable suspicion created by an informant's tip. Similarly, in Pennsylvania v. Mimms (434 U.S. 106), the Court upheld a frisk for weapons when an officer observed a bulge in the jacket of a man who had been ordered out of his car after being stopped for a traffic violation. As a result, the Terry exception was confined to situations where the detaining officer's safety was in question.

The second exception to the probable cause requirement for nonarrest seizures was created in what are commonly referred to as the border patrol cases. (United States v. Brignoni-Ponce, 422 U.S. 873; United States v. Martinez-Fuerte, 428 U.S. 543; United States v. Cortez, 101 S. Ct. 690.) The Brignoni-Ponce Court confronted the issue of vehicle stops made by roving border patrol agents on less than probable cause. Due to the unique law enforcement problems attending the patrol of the two-thousand mile open border with Mexico, the Court held that the Fourth Amendment does not require probable cause for border patrol stops

to ascertain citizenship (422 U.S. at 880). Nonetheless, the Court maintained that such stops had to be justified by specific and articulable facts supporting a reasonable belief that the vehicle contained illegal aliens. Id. at 883.

This demand for an articulable suspicion was reiterated by Chief Justice Burger's analysis in United States v. Cortez (101 S.Ct. 690). First, he reasoned that the "totality of the circumstances--the whole picture..." must be assessed on a practical level by law enforcement officers, and second, that their assessment must yield a particularized suspicion that the person to be detained is engaged in criminal activity. Id. at 695. While the facts of Cortez fit neatly under the border patrol exception, this Court's recent decision in Michigan v. Summers (101 S.Ct. 2587) cites Cortez as supporting the proposition that brief detentions of suspicious individuals for the purpose of "freezing" the situation while police conduct further inquiry may be reasonable under particular circumstances. Id. at 2591-92.

The Summers Court's retreat from the categorical approach of Terry to the "whole picture" analysis of Cortez created the need for a specific rule regarding the reasonableness of nonarrest seizures. The three broad criteria established by the Summers Court require that the intrusion of the seizure: (1) Must be limited in terms of time and extent; (2) must be justified by substantial law enforcement interests; and (3) must be related to the person seized by articulable facts which create a reasonable basis for suspecting criminal activity (101 S.Ct. 2587, 2592).

While the Court's narrow holding in Summers pertained to situations in which a seizure was effected pursuant to a valid search warrant for contraband, the three criteria established by the Court indicate that the case signals a departure from the traditional notions of constitutional seizures and represents a new standard for nonarrest detentions founded on less than probable cause. Nevertheless, the Court has not retreated from its mandate that there must be an individualized suspicion on the basis of articulable facts before an officer can detain an individual on less than probable cause. Reasonable suspicion must be maintained as a meaningful standard of probability. The Terry Court recognized that, unless such an objective standard is respected, no principled limitation would exist on the capacity of the police to accost our citizens and a critical bulwark of liberty would be lost.

C. Respondent's Fourth Amendment Rights were violated when he was detained and seized without any reasonable suspicion or on the basis of any articulable facts.

The critical question in this case is whether the initial investigative detention of respondent was justified by anything other than subjective hunch. The real question still is whether the police have the right in general to detain for investigation, or to otherwise invade privacy, on reasonable suspicion but without probable cause to arrest. As a matter of form, this may require pinpointing the stage of the encounter

at which the seizure occurs, but in substance it requires a decision as to the level of interference with a person's right to be let alone that we are willing to tolerate before judicial scrutiny is applied to determine the reasonableness of the basis for the interference.

As previously noted, the Summers rule holds that detentions on less than probable cause may be permissible if they are of limited nature, promote legitimate law enforcement interests, and are based on an articulable and individualized suspicion. Measured by these criteria, there was no reason for the police to confront the respondent. They lacked "probable cause," "reasonable cause," or, for that matter, any cause for his detention as he walked along the street minding his own business. For, even if it be postulated that less evidence is needed to supply cause for a brief on-the-street detention, there still must be a recognizable and justifiable cause, to wit: An articulable and individualized suspicion.

In the instant case there was a complete absence of any rationale for the officers' conduct, irrespective of whether such rationale could ever be a permissible basis for a compelled stop or not. Nelson was alone. He was on a public street in a low crime, residential area. The two policemen who accosted him had received no report that any crime had been committed, was being committed or was about to be committed, nor did they have "reasonable grounds" to suspect Nelson of having committed one.*

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*Such are the minimal requirements of the New York's "stop-and-frisk" statute (Criminal Procedure Law, Section 140.50).

They were engaged in no ongoing search for a specific suspect whether resembling the respondent or not, and they had not the slightest impression that respondent might be armed. There was nothing conspicuous, hurried or furtive in his walk either before or after the officers approached him. Nor was there anything unusual in his attire. He carried no packages or other objects which could possibly invite curiosity. He had not loitered or engaged in any suspicious conduct. He did not try to avoid the officers as they approached him. Though the police never gave him any reason for stopping and questioning him, he answered all their questions responsively and obeyed their demand for identification. He had not been seen to violate any ordinance or other law. Nor was there any claim of a high incidence of drugs in the area where Nelson was stopped. Consequently, there was no degree of belief reasonably generated on which could be founded suspicion "that criminal activity may be afoot" (Terry v. Ohio, 392 U.S. 1, 30).

In short, the accosting, stopping and detention of Nelson when it occurred, and assuming it was not undertaken simply as an act of harassment, can have been nothing but "the product of a volatile or inventive imagination" (Terry v. Ohio, 392 U.S. 1, 28) instead of the articulable suspicion of criminal activity that is the required precondition to any inteference by the police with a citizen's freedom of movement.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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WAYNE T. NELSON

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI IN FORMA PAUPERIS

STATE OF NEW YORK)
COUNTY OF ALBANY) ss.:

I, WAYNE NELSON, being first duly sworn, depose and say that I am the respondent, in the above-entitled case; that in support of my motion to proceed in opposition to the granting of a Writ of Certiorari without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are the following:

The New York State Court of Appeals was correct in its decision granting my motion to suppress certain evidence which was seized in violation of both my state and federal constitutional rights.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

Q 1. Are you presently employed?

A No, I have been incarcerated for the previous 4 years.

Q 2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

A No.

Q 3. Do you own any cash or checking or savings accounts?

A No.

Q 4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

A No.

Q 5. List the persons who are dependent upon you for support and state your relationship to those persons.

A None.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Wayne T. Nelson
WAYNE T. NELSON

Subscribed and sworn to before me this 15th day of February, 1983.

J. Stanton Lieberman
Notary Public, State of New York
Comm. Expires 3/30/84

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

UNITED STATES SUPREME COURT JUSTICE